



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 5, 1998

Mr. David R. Gipson  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR98-0612

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113252. Your office has assigned this request tracking number TDA-OR-97-0076.

The Texas Department of Agriculture (the "department") received a request for TDA Incident No. 2424-05-97-0029. You state that some of the information will be released to the requestor. However, you claim that the remaining information is excepted from disclosure under sections 552.101, 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

The department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapter 76 of the Agriculture Code. Agric. Code § 76.007(a). Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h). In this instance, the department has

supplied this office with information which shows that there is an ongoing investigation, and the department will take enforcement action as authorized by statute if a violation is found. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the department are related to the reasonably anticipated litigation for the purposes of section 552.103(a). The documents may, therefore, be withheld pursuant to section 552.103.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/glg

Ref.: ID# 113252

Enclosures: Submitted documents

cc: Mr. Joe A. Brymer  
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(w/o enclosures)